No. 14,955

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD RAYMOND EGE, JOSEPH BOYD and JOSEPH VICTOR BRUNO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT JOSEPH BOYD'S CLOSING BRIEF.

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1. GENERAL COMMENTS ON APPELLEE'S BRIEF.

This closing brief is directed only to those portions of appellee's brief that concern appellant Boyd.

Appellee, in discussing the evidence and its competency to establish the conspiracy charged and appellant's connection therewith, has not segregated the extrajudicial statements of alleged coconspirators from the admissions claimed to have been made by Boyd. On the contrary, appellee has used the extrajudicial acts and statements of Ege as the foundation for the admission in evidence of the claimed admissions by Boyd and then has used Boyd's admissions as the basis for the admission of the

extrajudicial acts and statements of Ege. This cannot be done. Incompetent evidence cannot be used as the basis for admitting other incompetent evidence and then using the incompetent evidence so admitted as justifying the admission in evidence of the first class of incompetent evidence.

Throughout the brief appellee stresses the fact that "He (Boyd) advertised girls from California (Tr. 212)". A reference to R. 212 shows that on one occasion he told Briley, whether in response to a question by Briley does not appear, that "two more girls were supposed to show up * * * they were coming from California".

On page 4, appellee states that "Boyd admittedly knew Bruno and the fact that Bruno operated a house of prostitution in Delano, California (Tr. 237, 245, 246)." Such is not the fact. On R. 236-7, Mr. Moe of the F.B.I. testified:

> "Concerning Mr. Bruno, he stated he was remotely acquainted with Joe Bruno. He had heard rumors that Bruno operated a house of prostitution, but he thought that Bruno was too smart to be involved in such an operation."

The conversation between Boyd and Moe occurred in 1955, long after the alleged conspiracy had terminated (R. 231). The statements did not relate to Boyd's knowledge at all, let alone as to what he knew in 1953.

Appellee's references to Tr. 245-6 relate to a conversation between F.B.I. agent Andress and Boyd on June 23, 1955, after the indictment herein had been filed. The statements made by Boyd on this occasion were as to his

then present knowledge, nothing in Andress' testimony is to the effect that in 1953 Boyd knew of any activities of Bruno.

Appellee then states that Boyd "was also aware that Constance Marie Bell had gone to Delano, California, from his brothel in Scottsdale, Arizona (Tr. 245)". This statement is subject to the same criticism as the foregoing.

Appellee states on page 5: "The Monterey Boulevard property was utilized as a rendezvous for prostitutes sent from San Francisco to Scottsdale, Arizona, for work in the Boyd bordello (Tr. 71, 102)". The transcript references are to Constance Bell's testimony. She testified that after her first visit to Monterey Boulevard she remained there a week (R. 69), that she went to a house of prostitution in Folsom where she remained for a week; that she returned to Monterey Boulevard "where I stayed for awhile while they hunted for a job for me" (R. 70). "Ege finally said he had found a job for me in Phoenix." (R. 71). All this is far different than the Monterey Boulevard property being used as a rendezvous for girls to be sent to Arizona.

It must be noted that from the time the Bell woman left Arizona there is no evidence that Boyd had any contact with Constance Bell, Judy Berg, Ege or Bruno. Anything occurring from that time on relating to Bell, Judy, Ege or Bruno must necessarily have been after Boyd's alleged connection with the conspiracy charged had terminated.

2. ERROR IN THE COURT'S FAILURE TO INSTRUCT THAT THE JURORS MUST ALL AGREE ON ONE OF THE OVERT ACTS.

This is in reply to the points in appellee's brief that "A special verdict was unnecessary" and "The jury were instructed its verdict must be unanimous".

Appellee is in error in arguing that Boyd claims it was error for the trial court not to submit special verdicts to the jury on each of the alleged overt acts. Our contention is that it was error not to instruct the jury—especially when a request so to do was made—that the jurors must all agree on at least one of the overt acts having been committed in furtherance of the alleged conspiracy.

Our reference to the request for special verdicts was to emphasize the rulings made in the cases cited in our opening brief which in turn emphasized the fact that no guidance of any kind, by special verdict or otherwise, was given the jurors confining their findings to a unanimous agreement on at least one of the overt acts.

The crime of conspiracy consists of two main elements, viz.: An unlawful agreement and an overt act done to further the agreement. Proof of only one does not establish the commission of a crime.

It is fundamental that to support a verdict of guilt the jurors must be unanimous in finding that all essential elements of the crime existed and were proved. Thus, in a criminal conspiracy prosecution, the jurors must all agree that the unlawful agreement was entered into by the accused and that one or more of the particular overt acts charged was committed in furtherance of the conspiracy.

If the jurors did not agree on at least one of the overt acts having been so committed there can be unanimity of the jurors as to the commission of the crime charged.

If, from the record, it cannot be ascertained that the jurors did all agree on at least one of such overt acts, then the verdict of guilty cannot stand.

Here it cannot be ascertained which of the overt acts any jurors agreed upon. Some of the charged acts admittedly were not established by the evidence while acts 8 to 14 involved other defendants after Boyd had ceased to be a part of any conspiracy to transport women for purposes of prostitution (a matter hereafter argued at some length).

Appellee criticizes our reliance on the case of *Cramer v. United States,* 325 U.S. 1, and others, on the ground that the overt acts there charged (treason) differed in nature from the overt acts charged herewith. *An overt act is an overt act,* whether it be an act done to give aid and comfort to an enemy of the United States (*Cramer v. United States,* supra; *Constitution,* Article III, Section 3) or to further the objective of a conspiracy. In either event the jurors must all agree on at least one such overt act having been committed and the record must affirmatively establish such fact.

Of course, if there is only one overt act charged there can be no question but what the jurors all agreed on the essential elements of the crime; but where there are numerous acts charged, some of which are proven and others without proof, then there is no way of telling whether the jurors all agreed on any one particular act.

Even where several acts have been proved, in the absence of a proper instruction there is no way of telling whether the jurors all agreed on any one particular act so charged. As this confusion can only be avoided by the trial judge instructing the jurors that they must all agree on at least one of the pertinent overt acts, error occurs in the failure to so instruct.

Appellee cites the cases of *Kepl v. United States* (9 Cir.), 299 F. 590, and *Bruno v. United States* (9 Cir.), 67 F. 2d 416, as authority for a contrary ruling. These cases did not involve the refusal or failure of the trial judge to instruct the jurors they must all agree on at least one overt act. These cases merely held that where an accused is charged with several distinct acts, the doing of one or more constituting a single offense, it is not necessary for the Government to prove all the acts alleged and that proof of the doing of a lesser number will support a conviction.

The case of *Samuel v. United States* (9 Cir.), 169 F. 2d 787, is to the same effect. However, the *Samuel* case, as does the case of *Stromberg v. California,* 283 U.S. 359, points out the distinction between a case where the indictment in separate counts charges several distinct acts as constituting separate and distinct crimes, and where only one count is composed of the doing of several distinct things. In the latter cases it is held that the jurors must all agree on at least one of the acts charged and if it cannot be ascertained that such agreement occurred then the verdict is void.

Whether the indictment charges a conspiracy to violate two or more laws of the United States, or whether it

charges a conspiracy to violate one law followed by several alleged overt acts, the law remains the same. The jurors must all agree, in the first instance, that the conspiracy was to violate one or more of the laws and the evidence must support such conclusion; in the second instance, the jurors must all agree that at least one specific overt act was performed in furtherance of the conspiracy. In the first instance, where one of the crimes alleged to be an object of the conspiracy is nonexistent or not supported by the evidence, a general verdict of guilty must be set aside if it cannot be ascertained that the jurors did not convict as to such specific crime. In the second instance, where some of the overt acts were not established by the evidence or some were not done in furtherance of the conspiracy, then the verdict of guilt must be reversed where it cannot be ascertained that the jurors all agreed on the commission of at least one of the overt acts proved to have been done in furtherance of the conspiracy.

Appellee's argument is without merit that because the judge instructed the jurors they must arrive at a unanimous verdict this cured the error.

The jurors undoubtedly did all agree that Boyd was guilty; but whether they agreed according to law cannot be ascertained from the record. As there were 14 overt acts charged, each juror may have found that Boyd was guilty and no two jurors have agreed as to the commission of any one specific overt act in furtherance of the conspiracy. One or more jurors may have based the conclusion on an overt act not established or on an act not done in furtherance of the conspiracy. Neither this

Court nor anyone else can determine that the jurors all agreed on one specific overt act, or what overt acts or act any juror found to have been committed.

The failure to instruct that all jurors must agree on the commission of at least one overt act established by the evidence resulted in depriving appellant of a fair trial, and his conviction was procured without due process of law.

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3. INSUFFICIENCY OF THE EVIDENCE.

In our opening brief (pp. 27 to 38) we argued that some reasons why the evidence was insufficient to establish the charge against Boyd was (1) that the extrajudicial acts and statements of Ege and Bruno could not be considered in the absence of independent proof of the conspiracy charged and Boyd's connection therewith, and (2) that the claimed admissions of Boyd were insufficient to establish the conspiracy charged in the absence of independent proof of the corpus delicti.

Appellee argues that the corpus delicti need not be established by independent proof before the admissions of a defendant are admissible in evidence; that independent proof of the truth of the admissions is all that is necessary, and that when such independent proof is supplied then the corpus delicti can be gathered from all evidence in the case, including the admissions of defendant.

However, this contention of appellee does not do away with the rule that the extrajudicial acts and declarations of a coconspirator cannot be used as evidence against

an accused unless and until the corpus delicti has been established by independent testimony. *In fact, appellee admits this proposition on page 25 of its brief,* and then seeks to establish the truth of the admissions—thus establishing the corpus delicti in part—by reference to such acts and declarations of the alleged coconspirators.

We know of no case, and appellee has cited none, holding that the extrajudicial acts and statements of a coconspirator not admissible or binding on the accused, in absence of proof of the conspiracy charged and accused's connection therewith, can be used for the purpose of establishing the truth of accused's admissions and thus establish the corpus delicti.

In *Smith v. United States,* 348 U.S. 147, cited by appellee, the Supreme Court states the question involved as follows:

> "* * * whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged * * *" (p. 156).

The court answers this question as follows:

> "All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused."

Just before the foregoing statements, the Supreme Court states:

> "It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable

> doubt, or even by a preponderance, as long as there is *substantial independent evidence that the offense has been committed,* and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty." *(Italics ours.)*

Our contention was not that the independent evidence had to establish the corpus delicti beyond a reasonable doubt; but that there has to be some independent evidence establishing the crime itself.

Appellee quotes a short passage from the case of *Opper v. United States,* 348 U.S. 84, referring to admissions of the defendant, as follows:

> "However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti."

But, immediately following the foregoing the Supreme Court explains the same as follows:

> "It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it *while also establishing independently the other necessary elements of the offense.* Smith v. United States, No. 52 this term (348 U.S. 147, * * *)." *(Italics ours.)*

Thus, if the defendant's admissions were as to essential elements of the corpus delicti, it is necessary for the Government to introduce independent evidence establishing the truth of such admissions, that is, independent proof of such elements of the crime.

Mere independent corroboration of an admission that constitutes only one element of the corpus delicti is insufficient. In *Opper v. United States,* supra, the court holds:

> "Turning to the instant case, it is clear that there was substantial independent evidence to establish directly the truthfulness of petitioner's admission that he paid the government employee money. But this direct corroborative evidence tending to prove the truthfulness of petitioner's statements would not establish a corpus delicti of the offense charged. Rather it tends to establish only one element of the offense—payment of money. *The Government therefore had to prove the other element of the corpus delicti*—rendering of services by the government employee—*entirely by independent evidence.*" (pp. 93-4). (*Italics ours.*)

Mere corroboration of admissions which do not involve elements of the corpus delicti are insufficient. Corroboration of an admission which merely establishes one element of the corpus delicti does not relieve the Government from producing independent evidence of the other elements thereof (*Opper v. United States,* supra, p. 91).

Neither the *Smith* case nor any other case holds that evidence incompetent in the absence of proof of the corpus delicti can be used to establish, in whole or in part, the corpus delicti.

Appellee then argues that the statements made by Boyd to bar owner Briley (Boyd's interest in acquiring a house for prostitution, getting two girls from California, etc.) were statements made to effect the object of the conspiracy. Boyd was not indicted for operating or con-

spiring to operate a house of prostitution in Arizona or elsewhere. He was indicted for conspiring to transport women in interstate commerce for the purpose of prostitution.

Any statements made by Boyd to Briley were made only for the purpose of bringing business to the house of prostitution and not for the purpose of aiding in the transporting of any woman for immoral purposes from California.

Next, appellee argues that any statements made by Boyd to Briley were "verbal acts" that "may be proved without violation of the hearsay rule because the utterance is not offered to evidence the truth of the matter which may be asserted within it." (citing Wigmore on Evidence, Section 1770).

If Boyd's statements to Briley were not offered for the purpose of proving the truth of the matter asserted, then for what were they offered? *The appellee repeatedly uses these statements to prove the truth of the utterances.* If the utterances do not evidence the truth of the statements, then the statements that Boyd expected two women to come from California etc. do not prove and cannot be used to prove such fact.

Wigmore on Evidence discusses "verbal acts" at length in Volume VI, Sections 1770 to 1788. We summarize these sections:

Extrajudicial utterances cannot be used to establish the fact asserted (Sections 1766 and 1788).

The declaration must be *contemporaneous with the act.* Anything said before or after the act is not receivable in evidence (Section 1783).

The conduct to be characterized by the words must be *independently material to the issue* (Section 1772).

The conduct must be *equivocal.* Where the act is unequivocal it furnishes no ground for the admission in evidence of the verbal act accompanying the same (Sections 1772, 1774) .

The words must accompany the conduct and aid in *giving legal significance to the conduct* (Section 1772).

In *Wolcher v. United States* (9 Cir.), 233 F. 2d 748, this Court discusses the foregoing sections of the text as follows:

> "Statements constituting verbal acts or verbal portions of acts are admissible only where the fact the statement was made is the significant matter sought to be proved. Here, however, the attempt would be to introduce Corriston's testimony as to Gersh's statement to establish the truth of what Gersh said, which purpose is not within the res gestae exception."

Here, Boyd was performing no act, either equivocal or unequivocal, material to the charge; therefore, his utterances did not explain or give legal significance to anything. The statement, if made, that he expected two girls from California did not constitute any proof that girls were coming from California or that Boyd had anything to do with girls coming from California.

Appellee then argues that Boyd's statements were admissible as declarations of present intention to import prostitutes from California. Admitting that under some circumstances evidence of intention is admissible, this rule does not open the door for all statements made by an

accused. Here, the statements made by Boyd according to Briley were:

"Q. Would you state what he said, in substance, what he said to you with reference to that?

A. Well, there was two more girls supposed to show up.

Q. Did he state from where?

* * * * * * *

A. As I recall, they were coming from California." (R. 212.)

An unequivocal statement that a person is going to do something is evidence, when such fact is in dispute, tending to prove that such person thereafter did such thing (*Mutual Life Ins. Co. v. Hellman,* 145 U.S. 285); but here we have no such statement. Boyd did not say he was bringing or intended to bring two girls from California, or that he had arranged for two girls to come from California, or anything like such statements. All that can be attributed to Boyd's utterances is that he "supposed" two girls intended to come from California. This was an expression of someone else's intention, not Boyd's.

(a) There is no legal corroboration of Boyd's admissions.

Mere corroboration of immaterial statements or admissions made by accused does not satisfy the law as to the probative effect of all admissions made. The corroboration, sufficient to establish the truth of the admissions and thus warrant their admission in evidence, *must be as to facts material to the charge and showing essential elements of the crime* (*Opper v. United States,* supra, at p. 91). Thus, corroboration of immaterial matters in a statement or confession of the accused does not establish the truthfulness of other portions thereof.

Appellee argues (p. 26) that certain statements by Boyd were corroborated, but an inspection of the record proves the contrary. These claimed corroborated circumstances are as follows: (1) Boyd admitted he operated a house of prostitution in Scottsdale and that Bell and Berg worked there. This stands admitted in the record. (2) That Boyd knew Bruno operated a house in Delano, California, and that Bell worked there. As pointed out above, Boyd's statements in this regard were as to rumors he had heard and which he disbelieved; these statements were as to Boyd's knowledge in 1955, two years after the alleged conspiracy had terminated. (3) Boyd admitted telephone conversations with Ege while Boyd was in Arizona and Ege in California. There is no evidence as to what these phone conversations were about or that they had anything to do with Bell and Berg coming to Arizona from California. (4) That Boyd advertised to Briley that two prostitutes were coming from California. This we have answered above with quotations from the record. (5) That Bell and Berg did come from California to Arizona to practice prostitution in Boyd's house. There is no evidence to establish that these women traveled from one to the other state as the result of any agreement or procurement on the part of Boyd. (6) That the transfer of the lease on the house on Monterey Boulevard established that this house was a rendezvous for prostitutes to be transported to Arizona. This has already been discussed.

The corpus delicti of this charge is the unlawful agreement between the appellants to transport women for the prohibited purpose. There is no evidence of any such agreement, and there is *no admission of Boyd even tend-*

ing to establish such agreement or any essential element thereof.

(b) There is no competent evidence aliunde against Boyd.

Appellee seeks to supply the evidence aliunde by recourse to acts of Ege prior to Constance Bell and Judy Berg coming to Arizona and acts between Bell, Ege and Bruno after Bell left Arizona. In doing so, *appellee has not attempted to differentiate between evidence affecting Ege and Bruno and that which might affect Boyd.* Before testimony as to any act or declaration of either Ege or Bruno is admissible against Boyd there must be evidence aliunde establishing the conspiracy and Boyd's connection therewith (see Boyd's Op. Br., pp. 28-31).

Ege's persuasion of Constance Bell to enter a life of prostitution, to live at the Monterey Boulevard house, to go to Folsom to practice prostitution and to give her money to Ege is not evidence of any conspiracy to transport her or any other woman to Arizona for purposes of prostitution. The evidence shows that after Bell came back from Folsom a week elapsed during which Ege was attempting to find "work" for her. There is no evidence that this search for work ended in any agreement between Ege and Boyd. The effect of Bell's, Ege's and Bruno's activities after Bell left Arizona will be discussed under the next heading.

4. **EVENTS AFTER CONSTANCE BELL LEFT ARIZONA NO PART OF CONSPIRACY CHARGED. IT WAS ERROR TO ADMIT SUCH EVIDENCE.**

Great reliance is placed by appellee on the testimony of Constance Marie Bell as to things occurring after she left Arizona. This evidence was most prejudicial to Boyd and it cannot be used to establish the independent testimony necessary to support the charge or make the extrajudicial acts and declarations of Ege or Bruno admissible against Boyd.

After Bell arrived in Arizona she received a telephone call from Ege suggesting that she fly to Delano, California, that Delano was open, that on arriving in California she was to phone Bruno, that Bruno picked her up in Bakersfield and drove her to Delano where she worked in Bruno's house and Bruno would count the money (R. 77-79); that from Delano she went to Fresno where Ege picked her up and they went back to San Francisco, then to houses of prostitution in Sacramento and Isleton (R. 81); that she gave the money she earned to Ege; that Ege sent her to a place outside Barstow, etc., that she was arrested and after that Ege drove her to Las Vegas, Nevada, where she broke off with Ege (R. 91).

The foregoing matters are set forth in the indictment as Overt Acts Nos. 8, 9, 10, 11, 12 and 14 (R. 5-6).

As these events were not part of any conspiracy to which Boyd was a party, it was error to admit such testimony in evidence against Boyd, and these acts did not constitute any overt acts in furtherance of any conspiracy of which Boyd then was a member.

There is no evidence in the record establishing any of the following things: (1) That Boyd knew anything about any telephone call from Ege to Bell; (2) That Boyd had anything to do with Bell leaving Arizona; (3) That Boyd had anything to do with Bell going to Delano or Fresno or Sacramento or Isleton, or any other place in California to practice prostitution; (4) That Boyd had anything to do with Bell giving her earnings to Ege; (5) That Boyd had anything to do with Bruno driving Bell from Bakersfield to Delano, or that Boyd had anything to do with Bruno's operation of a house of prostitution; and (6) That Boyd had anything to do with Ege driving Bell to Las Vegas; or (7) That Boyd knew any of such things.

Furthermore, there is no evidence that Boyd participated in or received any of the earnings of Constance Bell after she left Scottsdale, Arizona. This fact is of great importance. As said by this Court in *Samuel v. United States* (9 Cir.), 169 F. 2d 787, in conspiracy cases of this and similar types the purpose of making illegal gains and profits is of the utmost importance in establishing the charge, and the absence of such illegal profits is a strong indication that no such conspiracy existed.

Assuming, merely for purposes of argument, that Boyd was instrumental in having Bell and Berg come from California to work in his house of prostitution in Arizona, this does not establish that he was any party to Bell going back to California and working for Ege in houses of prostitution. Boyd had nothing to do with Bell leaving Arizona and knew nothing of what her future activities would be.

Appellee argues as follows on page 13 of its brief:

> "In the case before this Court, appellant Bruno must have known that he was acquiring the services of one who had worked at brothels before and who would be employed by brothels other than his own in the future. The evidence at the trial indicated that prostitutes are engaged in the same kind of 'here today and gone tomorrow' business as those who, in days past, entertained on the vaudeville circuits. Bell, herself, was at many houses in the few months covered by the indictment. Boyd knew when Bell left his place that she would go somewhere else, most probably to a place selected by her California residing 'pimp'. He also knew that if she continued to engage in prostitution business she would probably work at his house again. Bell was launched by Ege on the prostitution circuit. Each individual brothel owner, while playing his own special part in the scheme to transport prostitutes in interstate commerce, would of necessity know that other brothel owners would be involved, each playing a part in the conspiracy similar to his own but in different places and at different times."

The foregoing argument demonstrates the fallacy of appellee's contentions, as does appellee's statement on page 15

> "That it should be observed, however, that the victim in this case was a prostitute traveling on a prostitution circuit. Two of the places she stopped on the the way were Boyd's and Bruno's brothels. In fact, she traveled from one to the other."

Adopting appellee's analogy of the actor traveling on a vaudeville circuit, we find that each theater operator

would know that when the actor left his theater he was going to appear at another theater in another place. Would this make the first theater owner a conspirator with the second? Certainly not. Take this example: A man hires a known safe robber to rob a safe, the robber leaves and in another city is hired by someone else to rob another safe. The first hirer, knowing the man to be a safe robber, knew that he probably would go to another city and there rob another safe at someone's instigation. Does this make the two men hiring the robber conspirators? Certainly not.

It requires more than knowledge that one is going to commit a crime before guilt can be fastened on him. Knowledge alone is not enough to make one a conspirator; knowledge and acquiescence are insufficient; it requires knowledge, acquiescence and active cooperation to make one a coconspirator (*Egan v. United States* (8 Cir.), 17 F. 2d 369, 378; *Direct Sales Co. v. United States,* 319 U.S. 703; *Thomas v. United States* (10 Cir.), 57 F. 2d 1039).

Where in this record is there anything to show that Boyd had anything to do with Bell leaving Arizona for California, or working in Bruno's house, or going any of the other places in California, or going from California to Las Vegas? There is no such evidence.

Everything done by Bell, Ege and Bruno, after Bell left Scottsdale, were the independent acts of Bell, Ege and Bruno, outside of any conspiracy charged or established against Boyd.

Appellee relies on the decision in *Blumenthal v. United States,* 332 U.S. 539; but the facts therein do not support

appellee's contention; these facts are stated by the Supreme Court in footnotes 13 and 14 to the decision, to which we refer this Court.

When Constance Bell came to Scottsdale, Arizona, any connection of Boyd with the alleged conspiracy—assuming that he may have been a part thereof up to such time—terminated. When Constance Bell left Arizona and returned to California, all thereafter done was no part of any conspiracy to which Boyd was a member (Cf. *Krulewitch v. United States,* 336 U.S. 440).

Prejudicial effect of the evidence relative to all activities after Constance Marie Bell left Arizona.

The prejudicial effect on Boyd as to the admission in evidence of all the things done in California after Constance Marie Bell left Arizona is twofold.

(1) These matters are set forth as overt acts 8 to 14 in the indictment. None of these things were acts done in furtherance of any conspiracy to which Boyd was then a member. The failure of the court to instruct that all jurors must agree on at least one overt act done in furtherance of the conspiracy as to Boyd allowed some if not all the jurors to find a verdict of guilty on evidence not pertinent to the charge. It cannot be ascertained whether or not some jurors based their joining in the verdict solely because they found the overt acts to be one or more of these things occurring after Boyd's alleged membership in the conspiracy had terminated.

(2) As these matters were not chargeable to Boyd, the prejudicial effect of this incompetent evidence cannot be overemphasized. The same use thereof was made by the

prosecutor in arguing to the jury as had been made by appellee in its brief. Nothing could have been more erroneous and prejudicial.

All events happening after Bell left Arizona constituted a separate and distinct conspiracy of which Boyd was not a member and the admission of such evidence was reversible error (see cases cited in Boyd's Op. Br., pp. 37-8).

Dated, San Francisco, California,
September 21, 1956.

Respectfully submitted,
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